Bank Kerjasama Rakyat Malaysia Bhd v Temasek Blooms Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22M-503–05 OF 2024
YUSRIN FAIDZ JC
21 MAY 2025

Civil Procedure — Summary judgment — Application for summary judgment — Default of banking facility — Claim for outstanding amount — Whether procedural requirement for summary judgment complied — Whether there were triable issues — Whether defences lacked substantiation — Whether summary judgment appropriate — Rules of Court 2012 O 14 r 1

The plaintiff granted Temasek Blooms Sdn Bhd ('D1') with a Property Financing-i Facility (Restructuring) based on Tawarruq (commodity *murabahah*) for the sum of RM17,250,000 ('banking facility'). The plaintiff had accordingly disbursed the said banking facility to D1, and D1 has utilised the same. However, D1 subsequently failed, neglected, and/or refused to make the overdue monthly payments. The plaintiff, therefore, issued a notice of termination and claimed for the outstanding amount of RM21,752,707.43. Consequently, the plaintiff commenced proceedings against the defendants by filing a writ and statement of claim and applied for summary judgment under O 14 r 1 of the Rules of Court 2012 ('the ROC'). The application was opposed by D1 and its guarantors, the second and third defendants ('D2' and 'D3'), who contended that there exist triable issues warranting a full hearing. The issues that arose for determination were: (a) whether the plaintiff had complied with the procedural requirement of summary judgment application; and (b) whether the defendants had successfully raised genuine disputes of material fact that require a trial.

Held, allowing the application with costs:

(1) The plaintiff had satisfied all the requirements under O 14 of the ROC. The defendants entered appearance on 5 June 2024, and the deponent of the plaintiff's affidavit in support dated 29 August 2024 had affirmed, and verily believed, that there was no defence to the plaintiffs claim. As for the requirement of service of the writ and statement of claim, the entry of appearance and the subsequent filing of statement of defence on 23 July 2024 showed that the defendants were served with the writ and statement of claim. The burden thus shifted to the defendants to show cause as to why judgment should not be entered against them (see para 13).

(2) While the express provisions of the agreements vest the plaintiff with an unequivocal and unilateral discretion to review and restructure the terms of the banking facility, the plaintiff elected not to exercise such discretion unilaterally. Rather, the restructuring was in fact undertaken through mutual consent. Therefore, the defendants' claim that the plaintiff had caused confusion in the terms by such changes lacked substantiation. The plaintiff had provided a clear and comprehensive explanation as to how the calculations of the profit rate were made. The defendants, on the other hand, had failed to challenge this with credible evidence. Consequently, the plaintiff's explanation on this issue was satisfactory and did not warrant further examination, allowing it to be appropriately resolved at this stage (see paras 25 & 30).

(3) No complaint had been lodged, nor had any enforcement action been initiated by Bank Negara Malaysia against the plaintiff in relation to the alleged breach of Shariah principles. The defendants' objections appeared to have arisen only after the plaintiff commenced legal proceedings against them. D1's inaction, particularly their silence after receiving the funds under banking facility duly raised through the commodity *murabahah* financing arrangement, could only be construed as an implicit acknowledgment of the transaction's validity. D1 could not now seek to challenge the very transaction from which they have benefited (see paras 34 & 42).

(4) The commodity *murabahah* transaction was fully disclosed with all necessary details duly provided. There was no evidence of any concealment or omission on the part of the plaintiff in informing D1 of its rights or the material aspects of the transaction. Given D1's failure to exercise its rights under the relevant contractual provisions, including the right to request delivery or to terminate the transaction, the arrangement must be regarded as valid and binding. Accordingly, the matter did not give rise to any genuine issue requiring a trial (see para 45).

(5) The primary purpose of the commodity *murabahah* transaction was to generate cash for disbursement to the borrower. Given that the sum of RM17,250,000 was successfully raised and made available to D1, any alleged non-compliance with Shariah principles in the manner of raising the funds did not, in itself, vitiate the validity of the contract. Fundamentally, under the applicable laws governing financial and banking transactions, the method by which bank secured funds for its customers did not affect the legal enforceability of the facility agreement (see para 49).

(6) Based on the certificate of indebtedness and comparing it against the sums demanded at the time of arrears and upon termination, there was no manifest errors, nor any indication of negligence, misconduct, or

breach of contractual terms on the part of the plaintiff. Accordingly, this issue did not give rise to any triable matter warranting further judicial inquiry (see para 67).

[Bahasa Malaysia summary

Plaintif telah memberikan kepada Temasek Blooms Sdn Bhd ('D1') suatu Kemudahan Pembiayaan Hartanah-i (Penyusunan Semula) berasaskan Tawarruq (komoditi murabahah) bagi jumlah sebanyak RM17,250,000 ('kemudahan perbankan'). Plaintif telah, dengan sewajarnya, mengeluarkan kemudahan perbankan tersebut kepada D1, dan D1 telah menggunakannya. Namun demikian, D1 kemudiannya telah gagal, cuai, dan/atau enggan membuat bayaran bulanan tertunggak. Oleh yang demikian, plaintif telah mengeluarkan suatu notis penamatan dan menuntut bagi jumlah tertunggak sebanyak RM21,752,707.43. Berikutan itu, plaintif telah memulakan prosiding terhadap defendan dengan memfailkan suatu writ dan penyataan tuntutan serta memohon penghakiman terus di bawah A 14 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Permohonan tersebut telah dibantah oleh D1 dan penjamin-penjaminnya, iaitu defendan kedua dan ketiga ('D2' dan 'D3'), yang telah berhujah bahawa terdapat isu-isu yang perlu dibicarakan penuh. Isu-isu yang timbul untuk diputuskan adalah: (a) sama ada plaintif telah mematuhi keperluan prosedural bagi permohonan penghakiman terus; dan (b) sama ada defendan telah berjaya menimbulkan pertikaian tulen mengenai fakta material yang memerlukan perbicaraan.

Diputuskan, membenarkan permohonan dengan kos:

(1) Plaintif telah memenuhi semua keperluan di bawah A 14 KKM. Defendan telah memasukkan kehadiran pada 5 Jun 2024, dan deponen afidavit sokongan plaintif bertarikh 29 Ogos 2024 telah diikrarkan, dan dengan sebenarnya mempercayai, bahawa tiada pembelaan terhadap tuntutan plaintif. Berhubung dengan keperluan penyampaian writ dan penyataan tuntutan, kemasukan kehadiran dan pemfailan penyataan pembelaan pada 23 Julai 2024 menunjukkan bahawa defendan telah disampaikan dengan writ dan penyataan tuntutan. Beban oleh itu telah beralih kepada defendan untuk menunjukkan sebab mengapa penghakiman tidak patut dimasukkan terhadap mereka (lihat perenggan 13).

(2) Walaupun peruntukan nyata dalam perjanjian memberikan plaintif suatu budi bicara mutlak dan unilateral untuk menyemak dan menyusun semula terma-terma kemudahan perbankan, plaintif memilih untuk tidak melaksanakan budi bicara tersebut secara unilateral. Sebaliknya, penyusunan semula tersebut telah dilaksanakan melalui persetujuan bersama. Oleh itu, dakwaan defendan bahawa plaintif telah menimbulkan kekeliruan dalam terma melalui perubahan sedemikian adalah tidak berasas. Plaintif telah memberikan penjelasan yang jelas dan

menyeluruh mengenai cara pengiraan kadar keuntungan dibuat. Defendan, sebaliknya, telah gagal mencabar perkara ini dengan keterangan yang boleh dipercayai. Maka, penjelasan plaintif mengenai isu ini adalah memadai dan tidak memerlukan pemeriksaan lanjut, membolehkan ia diputuskan pada peringkat ini (lihat perenggan 25 & 30).

(3) Tiada aduan telah dibuat, dan tiada tindakan penguatkuasaan telah dimulakan oleh Bank Negara Malaysia terhadap plaintif berhubung dakwaan pelanggaran prinsip Syariah. Bantahan defendan hanya timbul selepas plaintif memulakan prosiding undang-undang terhadap mereka. Kegagalan D1 untuk bertindak, khususnya dengan berdiam diri selepas menerima dana di bawah kemudahan perbankan yang dilaksanakan melalui pengaturan pembiayaan komoditi murabahah, hanya boleh ditafsirkan sebagai pengakuan tersirat terhadap kesahan transaksi tersebut. D1 tidak boleh kini mencabar transaksi yang sama daripada mana mereka telah mendapat manfaat (lihat perenggan 34 & 42).

(4) Transaksi komoditi murabahah telah didedahkan sepenuhnya dengan segala butiran yang perlu diberikan. Tiada keterangan penyembunyian atau peninggalan oleh plaintif dalam memaklumkan D1 mengenai hak-haknya atau aspek material transaksi tersebut. Memandangkan kegagalan D1 untuk melaksanakan hak-haknya di bawah peruntukan kontrak yang berkaitan, termasuk hak untuk menuntut penghantaran atau menamatkan transaksi, pengaturan tersebut hendaklah dianggap sah dan mengikat. Oleh itu, perkara ini tidak menimbulkan sebarang isu tulen yang memerlukan perbicaraan (lihat perenggan 45).

(5) Tujuan utama transaksi komoditi murabahah adalah untuk menjana wang tunai bagi pembayaran kepada peminjam. Memandangkan jumlah sebanyak RM17,250,000 telah berjaya dijana dan disediakan kepada D1, sebarang dakwaan ketidakpatuhan terhadap prinsip Syariah dalam cara dana tersebut diperoleh tidak, dengan sendirinya, menjejaskan kesahan kontrak. Pada asasnya, di bawah undang-undang yang terpakai bagi urus niaga kewangan dan perbankan, kaedah bank mendapatkan dana untuk pelanggannya tidak menjejaskan keberkuatkuasaan undang-undang perjanjian kemudahan tersebut (lihat perenggan 49).

(6) Berdasarkan sijil keberhutangan dan perbandingan dengan jumlah yang dituntut pada masa tunggakan dan selepas penamatan, tiada kesilapan nyata, dan tiada tanda kecuaian, salah laku, atau pelanggaran terma kontrak oleh plaintif. Oleh itu, isu ini tidak menimbulkan sebarang perkara boleh bicara yang memerlukan siasatan kehakiman lanjut (lihat perenggan 67).]

Cases referred to

Amey Birmingham Highways Ltd v Birmingham City Council [2018] EWCA Civ 264, CA (refd)
Bache & Co (London) Ltd v Banque Vernes et Commerciale De Paris [1973] 2 Lloyd's Rep 437, CA (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, FC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643, HC (refd)
Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 212, PC (refd)
Flowgroup Plc (in liquidation) v Co-Operative Energy Ltd [2021] EWHC 344 (Comm), HC (refd)
Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd [1987] 2 MLJ 183, SC (refd)
Maybank Islamic Bhd v Golden Base Construction Sdn Bhd & 2 Ors (W-02(IM)(MUA)-1035–06 of 2019) (unreported), CA (folld)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (refd)
Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd [2014] SGHC 62; [2014] 2 SLR 1342, HC (refd)

Legislation referred to

Federal Constitution Ninth Schedule, List I, item 7(j)
Islamic Financial Services Act 2013 ss 28, 281
Rules of Court 2012 O 14, O 14 rr 1, 3

Muhammad Nasim Shafie (Sidek, Teoh, Wong & Dennis) for the plaintiff.
Khor Poay Ying (CH Tay & Partners) for the defendants.

Yusrin Faidz JC:

INTRODUCTION

[1] This case concerns the plaintiff's application under encl 10 for summary judgment in respect of an outstanding sum of RM21,752,707.43 as at 6 April 2024, arising from credit facilities granted to Temasek Blooms Sdn Bhd (first defendant/'D1'). The application is opposed by D1 and its guarantors, the second and third defendants ('D2' and 'D3'), who contend that there exist triable issues warranting a full hearing. The key issue for determination is whether the defendants have demonstrated a genuine issue requiring trial, or whether the plaintiff is entitled, as a matter of law, to the summary judgment sought.

BACKGROUND FACTS

[2] D1, a subsidiary of the Singapore-based Hatten Land Ltd, was a customer of the plaintiff co-operative bank. Based on an offer letter dated 22 September 2020 ('letter of offer'), supplementary offer letter dated 23 June 2021 ('SLO1'), supplementary offer letter dated 13 September 2022 ('SLO2'), and supplementary offer letter dated 3 August 2023 (SLO3) (collectively referred as the said offer letters), the plaintiff granted D1 with a Property Financing-i Facility (Restructuring) based on *Tawarruq* (commodity *murabahah*) for the sum of RM17,250,000 ('the said banking facility').

[3] The commitment of the parties to the facilities was further evidenced by the concomitant execution and/or issuance of the following documents:

(a) notification letter dated 5 October 2020 (notification letter);

(b) facility agreement executed by D1 on 26 November 2020 ('facility agreement');

(c) purchase request and undertaking to purchase executed by D1 dated 26 November 2020;

(d) *wakalah* agreement executed by D1 on 26 November 2020;

(e) *murabahah* sale contract executed by D1 on 26 November 2020 evidencing the *murabahah* sale price of RM25,726,003.56;

(f) joint and several guarantees executed by the D2 and D3 on 26 November 2020 ('the said guarantee'); and

(g) instruments of charge over nine properties located at Hatten Square, Malacca, comprising a total built-up area of 221,596.62sqft.

[4] The plaintiff has accordingly disbursed the said banking facility to D1, and D1 has utilised the same. However, D1 subsequently failed, neglected, and/or refused to make the overdue monthly payments. Consequently, the plaintiff, through Messrs Sidek Teoh Wong & Dennis, issued a demand dated 6 February 2024 claiming the arrears of RM550,978.74 as at 6 February 2024 (see exh NBN5 of encl 11).

[5] As D1 failed to adhere to the demand, the plaintiff has through Messrs Sidek Teoh Wong & Dennis, issued a notice of termination dated 2 May 2025 and claimed for the outstanding amount of RM21,752,707.43 as at 6 April 2024 (see exh NBN6 of encl 11). A statement of account was issued by the plaintiff pursuant to the relevant clauses under the facility agreement as well as the guarantee (see exh NBN7 of encl 11); evidencing the same outstanding sum.

[6] On 13 May 2024, the plaintiff commenced proceedings against the defendants by filing a writ and statement of claim. The defendants filed their defence on 23 July 2024.

[7] On 30 August 2024, the plaintiff applied for summary judgment under O 14 r 1 of the Rules (encl 10), wherein upon considering the cause papers and submissions filed I had on 10 February 2025 allowed the entry of final judgment against the defendants for the sum of RM21,752,707.43 as at 6 April 2024, with the applicable *ta'widh* and costs of RM5,000. Dissatisfied with the decision, the defendants subsequently filed a notice of appeal on 11 March 2025.

ISSUES

[8] The application in encl 10 addresses the following issues:

(a) whether the plaintiff has complied with the procedural requirement of summary judgment application ('procedural requirement'); and

(b) whether the defendants have successfully raised genuine disputes of material fact that require a trial ('defendants showing cause').

Issue 1: Procedural requirement

[9] In relation to the application for summary judgment, the first issue for the court's consideration is whether the requisite pre-conditions for its grant have been duly met. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (FC), the Federal Court held that:

> For the purpose of an application under O 14 the preliminary requirements are:
>
> (a) the defendant must have entered an appearance;
>
> (b) the statement of claim must have been served on the defendant; and
>
> (c) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
>
> If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and hebecomes entitled to judgment. This burden then shifts to the defendant to satisfy the court why judgment should not be given against him ...

[10] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544 (FC) held that:

> [5] Quite clearly, the Court of Appeal has put the burden on the plaintiff to prove his case in an O 14 application. With respect, that cannot be the correct proposition of law. In an application under O 14, the burden is on the plaintiff to establish the

following conditions: that the defendant must have entered appearance; that the statement of claim must have been served on the defendant; that the affidavit in support must comply with r 2 of O 14 in that it must verify the facts on which the claim is based and must state the deponent's belief that there is no defence to the claim (see *Supreme Leasing Sdn Bhd v Dior Enterprises & Ors* [1990] 2 MLJ 36). *Once those conditions are fulfilled, the burden then shifts to the defendant to raise triable issues. The law on this is trite*. (Emphasis added.)

[11] This is in line with the preconditions set out in O 14 r 1 of the Rules which read as follows:

(1) Where in an action to which this rule applies a *statement of claim has been served on a defendant* and that *defendant has entered an appearance* in the action, *the plaintiff may*, on the ground that defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, *apply to the court for judgment against that defendant*.

(2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes —

(a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or

(b) a claim by the plaintiff based on an allegation of fraud.

(3) This order shall not apply to an action to which O 81 applies. (Emphasis added.)

[12] The fundamental principle of summary judgment is to streamline litigation by resolving cases without the need for a full trial when no genuine disputes of material fact exist. Although summary judgment can greatly reduce time and costs, its improper use could jeopardise a party's constitutional right to due process and a fair trial. To prevent such potential prejudice, the Rules require strict compliance with notice requirements, ensuring the opposing party is given adequate opportunity to respond. Hashim Yeop Sani SCJ (as he then was) in *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (SC) at p 183 state as follows:

(4) The underlying philosophy in the O 14 provision is to prevent a plaintiff clearly entitled to the money from being delayed his judgment where there is no fairly arguable defence to the claim. The provision should only be applied to cases where there is no reasonable doubt that the plaintiff is entitled to the judgment. Order 14 is not intended to shut out the defendant. The jurisdiction should only be exercised in very clear cases.

[13] Based on the facts of the case, I am of the view that the plaintiff has satisfied all the requirements under O 14 of the Rules. The defendants entered appearance on 5 June 2024, and the deponent of the plaintiff's

affidavit-in-support dated 29 August 2024 has affirmed, and verily believes, that there is no defence to the plaintiff's claim. As for the requirement of service of the writ and statement of claim, the entry of appearance and the subsequent filing of statement of defence on 23 July 2024 shows that the defendants were served with the writ and statement of claim. The burden thus shifts to the defendants to show cause as to why judgment should not be entered against them.

Issue 2: Defendants showing cause

[14] Upon shifting of this burden, O 14 r 3 of the Rules requires the defendant satisfy the following:

> (a) unless on the hearing of an application under rule 1 either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the part of a claim, to which the application relates that *there is an issue or question in dispute which ought to be tried* or that *there ought for some other reason to be a trial* of that claim or part, the court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed; and
>
> (b) the court may by order, and subject to such conditions, if any, as may be just, stay the execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action. (Emphasis added.)

[15] The burden which is shifted to the defendant is a tactical one. This is succinctly described in the Singapore High Court case of *Ritzland Investment Pte Ltd v Grace Management & Consultancy Services Pte Ltd* [2014] SGHC 62; [2014] 2 SLR 1342 (HC) at paras [45]–[47], wherein Vinodh Coomaraswamy J held as follows:

> [45] I should point out, however, that *the burden which shifts to the defendant upon a prima facie case being shown is the burden on the application or a tactical burden, not the legal or even an evidential burden of proof.* It would be anomalous for a defendant to bear the legal burden of proof on a summary judgment application when at trial, that burden explicitly rests on the plaintiff. And *the fact that it is for the plaintiff first to show a prima facie case with knowledge of and in light of the defences raised makes clear that no evidential burden rests on the plaintiff. It is no part of the policy underlying summary judgment to reverse a plaintiff's burden of proof.*
>
> [46] The policy underlying summary judgment is twofold and comprises a private and a public element. First, summary judgment enables a plaintiff with a strong claim to secure a judgment in a period of time and at an expense which is proportionate to the dispute. Second, summary judgment proceedings enables the court to conserve scarce public resources where there is no reasonable or fair probability that deploying those resources in a full trial would make a difference to the just determination of the dispute.

> [47] Thus, *although it is useful shorthand to speak in terms of the burden of proof shifting to the defendant, the fact remains that the court will grant summary judgment if the plaintiff shows after all the evidence is in that the there is no fair or reasonable probability that the defendant has a real or bona fide defence and (only if the defendant raises this point) that there is no other reason why there ought to be a trial*. (Emphasis added.)

[16] In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400 (FC), the Federal Court held that where an assertion, denial or dispute is equivocal, or lacking precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable in itself, then such assertion or denial will be rejected, thereby rendering the issue not triable. In other words, leave to defend will not be granted based upon 'mere assertions' by defendant; instead, the court will look at the whole situation critically to examine whether the defence is credible.

[17] In the Privy Council case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (PC), at p 217, Lord Diplock explained it as thus:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be. In making such order on the application as 'he may think just' the judge is vested with a discretion which he must exercise judicially. It is for him to determine in the first instance whether statements contained in affidavits that are relied upon as raising a conflict of evidence upon a relevant fact have sufficient prima facie plausibility to merit further investigation as to their truth.

[18] It is trite that the affidavit in opposition to the summary judgment must condescend upon particulars and directly address the claimant's claims and supporting affidavit. In short, it should clearly outline what the defendant's defence is as well as the factual basis for it. The affidavit must contain sufficient information to demonstrate a genuine dispute requiring a trial. A general denial of the plaintiffs claims will not suffice.

[19] In light of the foregoing, I shall now proceed to consider the issues raised by the defendants in opposition to the plaintiffs application for summary judgment.

Whether the plaintiff is allowed to restructure the banking facility, and are the terms ambiguous and unjust

[20] On this issue, learned counsel for defendants, Khor Poay Ying, argues that the change in repayment tenure from 92 months to 98 months, and the 'payment holiday' of 24 months to 30 months resulted in an uncertainty of the repayment terms.

[21] The learned counsel for the plaintiff, Muhammad Nasim Shafie, has submitted that the plaintiff was duly entitled to restructure the banking facility. It is emphasised that this restructuring was conducted in a formal and proper manner, with D1 having executed all requisite documentation, binding itself as well as its guarantors, D2 and D3.

[22] From the evidence, I am of the view that the variation is properly documented. Set out in Figures 1, 2 and 3 below are the repayment terms as set out in the initial letter of offer, SLO1 and SLO2:

The payment of *murabahah* sale price shall be by monthly instalment as below:

Instalment	Amount per Instalment (RM)	Number of Instalments	Total (RM)
1st-24th	137,712.50	24	3,305,100
25th-92nd	329,719.17	68	22,420,903.56
Total		92	25,726,003.56

Fig 1: Repayment terms as per initial letter of offer dated 22 September 2020 (p 14 of encl 11)

Instalment	Amount per Instalment (RM)	No of Instalment	Total (RM)
1st-4th	Duly paid	4	395,775.65
5th-10th	Payment Holiday	6	-
11th-29th	108,962.50	19	2,070,287.50
30th	767,737.50	1	762,737.50
31st-97th	312,835.00	67	20,959,945.00
98th	1,537,257.91	1	1,537,257.91
TOTAL		98	25,726,003.56

Fig 2: Repayment terms as per SLO1 dated 23 June 2021 (p 42 of encl 11)

The payment of rescheduled *murabahah* sale price shall be by monthly instalments as follows:

Instalment	Amount per Instalment (RM)	No of Instalment	Total (RM)
1st-4th	Duly paid	4	395,775.66
5th-10th	Payment Holiday	6	-
11th-17th	Duly paid	7	676,648.71
18th-23rd	Payment Holiday	6	-
24th-30th	103,740.54	7	726,183.78
31st-92nd	307,281.50	62	19,051,453.00
93rd-97th	417,737.70	5	2,088,688.48
98th	2,787,253.96	1	2,787,253.96
TOTAL		98	2,787,253.96

Fig 3: Repayment terms as per SLO2 dated 13 September 2022 (p 46 of encl 11)

[23] I am of the considered view that based on cl 24 B of section 2 (standard terms and conditions) to the letter of offer dated 20 September 2020, it is clear that the plaintiff has the right to unilaterally amend and vary the terms of the facilities:

> 24 Other Terms and Conditions
>
> A. ...
>
> B. The Facility set out in this Letter of Offer is subject to review, amend or cancel at the sole and absolute discretion of the Bank at any times as it deems fit with notification to the Customer.
>
> ...

[24] A careful examination of the facility agreement dated 26 November 2020 reveals the presence of cl 21, which expressly confers upon the plaintiff the unilateral right to review and restructure the facility:

> 21 VARIATION OF TERMS
>
> 21.1 It is hereby expressly agreed and declared by the parties hereto that notwithstanding any of the provisions of this Agreement to the contrary, *the Bank may at any time at the Bank's absolute discretion without discharging in any way the Customer's liabilities hereunder and the other Transaction Documents vary and/or ad to the terms of this Agreement and/or the other Transaction Documents* including but not limited to the rate imposed by the authority, additional charges, compensation charges and any other charges herein stated and the amount or form of the Facility granted so as to convert the existing facility to another facility or to create two or more facilities from the Facility (provided always at the applicable profit rate) and such variation and/or addition shall take effect upon notice being given by the Bank to the Customer subject always to Shariah principles. Such variations and/or

A additions shall thereupon be deemed to have been varied and/or added accordingly, and shall be read and construed as if such variations and/or additions have been incorporated into and had formed part of this Agreement at the time of the execution hereof. (Emphasis added.)

B **[25]** While the express provisions of the agreements vest the plaintiff with an unequivocal and unilateral discretion to review and restructure the terms of the banking facility, the plaintiff, in the present case, elected not to exercise such discretion unilaterally. Rather, a careful examination of the circumstances surrounding the documentation of the banking facility reveals that the C restructuring was, in fact, undertaken through mutual consent.

[26] Pursuant to the terms set forth in the SLO1, a restructuring exercise was undertaken to mitigate the business and financial hardships faced by D1 D during the COVID-19 pandemic. This arrangement granted D1 a six-month grace period, during which no installment payments were required, thereby affording much-needed financial reprieve. In furtherance thereof, the original tenure of 92 months was extended to 98 months.

E **[27]** Subsequently, under SLO2, D1 was granted an additional six-month payment holiday, providing further financial relief without any extension to the overall tenure. Throughout this period, the *murabahah* profit rate and the bank's ceiling rate remained constant at 1.25% + BFRpa and 9.58%pa, respectively. Importantly, the *murabahah* sale price continued to stand at F RM25,726,003.56, unchanged despite the deferment in repayments, an arrangement clearly favourable to D1.

[28] This restructuring framework, while aimed at addressing D1's immediate financial constraints, did not result in any increase in profit charges. G Instead, the monthly instalments were adjusted upward in the subsequent months to offset the payment holiday, preserving the financial integrity of the original arrangement.

[29] In continuation of the restructuring efforts, SLO3 dated 3 August H 2023 introduced an additional condition whereby D1 was required to furnish a letter of undertaking to address the shortfall in the Financial Services Reserve Account ('FSRA'). Specifically, D1 undertook to replenish the outstanding sum of RM1,237,610.57 within 12 months from 31 May 2023.

I **[30]** From the evidence presented, the defendants' claim that the plaintiff had caused confusion in the terms by such changes lacks substantiation. In my considered view, the plaintiff has provided clear and comprehensive explanation as to how the calculations of the profit rate was made. The defendant on the other hand have failed to challenge this with credible

evidence. Consequently, I am persuaded that the plaintiffs explanation on this issue is satisfactory and does not warrant further examination, allowing it to be appropriately resolved at this stage.

Whether the commodity *murabahah* component of the banking facility breached Shariah principles

[31] Learned counsel for the defendants contends that the banking facility contravenes Shariah principles on the grounds that D1 was not informed of the specific commodities involved in the commodity *murabahah* transaction. This alleged breach is further compounded, according to the defendants, by the absence of proper authorisation for the plaintiff to act as DVs agent in managing the said commodities. Additionally, D1 asserts that it was not made aware that it would bear 50% of the 'commodity trading fee.'

[32] Conversely, learned counsel for the plaintiff submits that the quantity of commodities was duly agreed upon by D1, as evidenced by the *murabahah* sale contract dated 26 November 2020 which was duly executed by D1. The plaintiff further contends that the commodity transactions are conclusively established by the issuance of e-certificate No CPO26NOV20–0000248–000 by Bursa Malaysia Islamic Services Sdn Bhd ('BMIS') (see pp 135–146 of encl 11).

[33] In response to the defendants' assertion that there was no agency document authorising the plaintiff to conduct the commodity transactions or to impose an equal (50:50) sharing of the commodity trading fee, the plaintiff contends that D1 had expressly agreed to these terms as reflected in the duly executed agreements.

[34] At the outset, I note that no complaint has been lodged, nor has any enforcement action been initiated by Bank Negara Malaysia against the plaintiff in relation to the alleged breach of Shariah principles. It is also significant that the defendants' objections appear to have arisen only after the plaintiff commenced legal proceedings against them.

[35] To analyze the argument on Shariah compliance, cll 11.2, 13.1, 13.5, 13.6, 13.7, 13.8, 13.9, 13.11, 13.13, 13.14 and 23.4 of Bank Negara Malaysia's Policy on *murabahah*-based financing, published on 23 December 2013 (Ref: BNM/RH/STD 028–4), are relevant in assessing what is required to be proven in respect of commodity *murabahah* transactions:

> 11.2 The specific inherent nature of the contract of *murabahah* is the sale contract which is based on the element of trust in disclosing the cost and mark-up. The common *inherent nature of a sale contract is the transfer of ownership of the asset from the seller to the purchaser*.

A ...

13.1 *Asset to be traded in a murabahah contract shall meet the following conditions*:

(a) the *asset is recognised by the Shariah, valuable, identifiable and deliverable*; and

B (b) the *asset is already in existence and owned by the seller*.

...

13.5 *The ownership in the murabahah asset must be effectively transferred from the seller to the purchaser.*

C 13.6 The transfer of ownership is effected upon entering into a valid sale and purchase contract even though there is no legal registration of the ownership, provided that the sale and purchase is supported by *evidence of transaction*.

13.7 The transfer of ownership shall take effect by the *seller disposing of the right of* D *ownership (takhliyah)* resulting in the purchaser having *access to the asset (tamkin)* and assuming its risk through any mechanism permitted by the Shariah and generally accepted by customary business practices *(urf tijari).*

13.8 Possession of the asset shall either be in the form of *physical possession (qabd haqiqi)* or *constructive possession (qabd hukmi).*

E 13.9 Pursuant to paragraph 13.8, the *rights and liabilities of the purchaser as the owner of the asset shall be established upon his possession* of the asset.

13.11 Multiple *murabahah* contracts shall not be entered into simultaneously on the same asset.

F 13.13 *Any defect in the asset which is discovered and consented to by the purchaser at the time of entering into the contract shall disqualify the purchaser from entitlement to the defect option (khiyar al-ayb) with respect to the defect.*

13.14 *Any defect in the asset which occurred before entering into the contract but is discovered after entering into the contract shall entitle the purchaser to the defect option* G *(khiyar al-ayb).*

...

23.4 *IFI shall ensure* that the order or application by the customer for the purchase of asset is *supported by a written document. At minimum, the document shall outline* H *the following:*

(a) *description and quantity of the asset to be acquired;*

(b) *estimated purchase price*; and

(c) *proposed supplier of the asset* (if applicable). (Emphasis added.)

I

[36] On the issue of certainty and avoidance of *gharar,* this court is of the view that there is certainty in the subject matter as the e-certificate was issued by BMIS which is a Commodity *Murabahah* House ('CMH') approved by Bank Negara Malaysia which specifies the commodity's location, quantity, and

quality. In essence, BMIS is a commodity trading platform specifically established to facilitate Islamic liquidity management and financing for Islamic financial institutions. Conceived as a national project, BMIS represents the collaborative efforts of Bank Negara Malaysia, the Securities Commission of Malaysia, Bursa Malaysia Bhd, and key industry stakeholders, in support of an initiative spearheaded by the Malaysia International Islamic Financial Centre.

[37] Specific to its role in the Islamic finance, the relevant ruling of the Bank Negara Malaysia's Shariah Advisory Council pertaining to such online commodity platform would be the ruling issued during its 78th meeting held on 30 July 2008 have resolved that the operational structure of a CMH is permissible on the condition that the traded crude palm oil shall be identifiable and precisely determinable in terms of its location, quantity and quality (see: *Shariah Resolutions in Islamic Finance* (2nd Ed), Bank Negara Malaysia (2010)).

[38] According to *Shariah Resolutions in Islamic Finance, Bank Negara Malaysia,* commodity *murabahah* is characterised as a *mu'amalah* comprising two stages of transaction. In the first stage, the buyer purchases an asset on credit from the original seller. In the second stage, the buyer sells the asset on a cash basis to a third party. This arrangement is termed commodity *murabahah* because the buyer acquires the asset on credit not with the intention of utilising or benefiting from it, but with the objective of selling it to obtain liquidity.

[39] This method of obtaining liquidity or financing is explicitly outlined in cl 4 of section 1 (standard terms and conditions) of the letter of offer dated 22 September 2020, which provides as follows:

> 4 Underlying Shariah Concept & Definition:
>
> Tawarruq (Commodity Murabahah).
>
> Whereby the Customer requests to the Bank by issuance of a Purchase Request to purchase as stated in Clause 6 (Section 1) hereof and the *Customer promises (wa'd) to purchase the Commodity from the Bank* at the Bank's Sale Price (cost plus profit) ('Murabahah Sale Price') on deferred term upon the Bank's receiving all rights, titles and benefits to the Commodity.
>
> Subsequently, the *Customer appoints the Bank as its agent to sell the Commodity* to a commodity trader or a party other than the Bank, at the Bank's Purchase Price (cost) for immediate payment. (Emphasis added.)

[40] Further, based on cll 1 and 4 of section 2 (standard terms and conditions) of the letter of offer dated 22 September 2020, D1 have made the required purchase request, appointed the plaintiff as agents to transact the said commodity, and agreed to equally share (50:50) the commodity trading fees. Both clauses are repeated herein for ease of reference:

> 1. *Underlying Shariah Concept*: *Tawarruq (Commodiv Murabahah)*
>
> Whereby the *Customer requests the Bank by issuance of a Purchase Request (as per the format of the Facility Agreement) to purchase a commodity stated* ('the Commodity') and promises (wa'd) to purchase the Commodity from the Bank at the Bank's Sale Price (cost plus profit) ('Murabahah Sale Price') on deferred term upon the Bank's receiving all rights, titles and benefits to the Commodity.
>
> Subsequently, *the Customer appoints the Bank as its agent to sell the commodity to a commodity trader* or a party other than the Bank, at the Bank's Purchase Price (Cost) for immediate payment.
>
> *The Customer also authorizes the Bank to collect and thereby remit the collections therefrom to the Customer at designated account*(s) and/ or other parties/ accounts as may be instructed by the Customer in the manner set out in the Facility Agreement and such amount paid to the Customer shall be deemed to form part of the Facility made hereunder and the acknowledgment or receipt of such parties shall be deemed as if the same had been made or given by the Bank.
>
> ...
>
> 4. *Commodity Trading Fee:* To be determined at the point of each Murabahah sale.
>
> *Note: *The Commodity Trading fee shall be shared equally (50:50) between the Bank and the Customer accordingly*. (Emphasis added.)

[41] Therefore, I am of the view that D1 had expressly consented to the commodity transaction, the appointment of the plaintiff as agent, as well as to equally share the commodity trading fee. Further to this, it is important to emphasize that D1 as the purchaser of the commodity retained the right to terminate the contract under cl 13.15 of Bank Negara Malaysia's Policy on *murabahah*-based financing which expressly provides that:

> 13.15 Pursuant to 13.14, the purchaser has the right to terminate the contract. Alternatively, the purchaser may choose to continue with the contract as it is or with any mutually agreed variations of the terms of the contract.

[42] D1's inaction, particularly their silence after receiving the funds under banking facility duly raised through the commodity *murabahah* financing arrangement, can only be construed as an implicit acknowledgment of the transaction's validity. D1 cannot now seek to challenge the very transaction from which they have benefited without having exercised their right to terminate as provided under cl 13.15.

[43] Further, I am of the considered view that D1's assertion that they did not sign the agency contract (*wakalah*) dated 26 November 2020 is devoid of merit. The said agency contract (*wakalah*) was prepared on D1's own letterhead and duly executed by its director, D2 thereby evincing clear and unequivocal authority on the part of D1 in entering into these arrangements.

The purchase request dated 26 November 2020 was issued in similar manner (see exh NBN2 of encl 11 at pp 125–128).

[44] There is likewise no evidence before this court to indicate that D1 ever requested delivery of the underlying commodity, either prior to or following the transaction. To place the matter in perspective, had D1 insisted on taking possession of the crude palm oil instead of receiving the proceeds from its sale, it would have entailed handling approximately 4,720 metric tonnes, requiring transportation by around 189 tanker lorries, each with a capacity of 25 tonnes. The sheer logistical impracticality of such an undertaking highlights the implausibility of D1's claim to rights over the physical commodity. It defies commercial rationale and undermines the fundamental objective of the *murabahah* transaction, which was clearly structured to facilitate liquidity through the sale of the commodity, not its physical transfer.

[45] In light of the foregoing, and upon careful examination of the particulars contained in the e-certificates, I am satisfied that the commodity *murabahah* transaction was fully disclosed, with all necessary details duly provided. There is no evidence of any concealment or omission on the part of the plaintiff in informing D1 of its rights or the material aspects of the transaction. Given D1's failure to exercise its rights under the relevant contractual provisions, including the right to request delivery or to terminate the transaction, the arrangement must be regarded as valid and binding. Accordingly, the matter does not give rise to any genuine issue requiring a trial.

[46] Should the e-certificates from BMIS be considered insufficient proof of commodity *murabahah* transaction and therefore deemed Shariah non-compliant, I am of the considered view that such a provision, forming financial institution's duty to comply with Shariah principle and the rulings of SAC under s 28 of Islamic Financial Services Act 2013 ('the IFSA 2013'), does not operate to nullify the contractual terms agreed upon between the plaintiff and D1. This is so as laws relating to finance and banking matters are included under item 7(j) of the Federal List (List I) in the Ninth Schedule to the Federal Constitution, which is to be governed by statute law and common law (including English law).

[47] Furthermore, s 281 of the IFSA upholds the sanctity of contracts, even where, on its face, such enforcement appears to be at odds with the guidelines and regulatory framework established under the IFSA:

> 281 Breach or contravention not to affect contract, agreement or arrangement

A Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:

B Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

C **[48]** Specific to summary judgment application the Court of Appeal in *Maybank Islamic Bhd v Golden Base Construction Sdn Bhd & 2 Ors* (W-02(IM)(MUA)-1035–06 of 2019) (unreported) (CA) have held that, applying s 281 of the IFSA 2013, a breach of Shariah principle alone does not render the existence of a triable issue in a summary judgment application.

D **[49]** Applying this principle to the present case, the primary purpose of the commodity *murabahah* transaction was to generate cash for disbursement to the borrower. Given that the sum of RM17,250,000 was successfully raised and made available to D1, any alleged non-compliance with Shariah principles in the manner of raising the funds does not, in itself, vitiate the validity of the E contract. Fundamentally, under the applicable laws governing financial and banking transactions, the method by which a bank secures funds for its customers does not affect the legal enforceability of the facility agreement.

Whether the plaintiffs claim is substantiated by the certificate of indebtedness

F

[50] On the issue of the accuracy of the amount claimed, learned counsel for the defendants argues that the sum demanded and set out in the statement of claim is incorrect, citing the inclusion of allegedly unlawful charges; namely, the *murabahah* profit rate and the *ta'widh* (compensation charges). Counsel G further contends that the plaintiff failed to account for *ibra'* (rebate) in the calculation of the outstanding sum. These contentions form the basis of the defendants' strong objection to the amount stated in the certificate of indebtedness and underpin their assertion that the calculation is flawed.

H **[51]** The learned counsel for the plaintiff on the other hand argues for the strict application of conclusive evidence clauses within the facility agreement as well as the guarantee. Proof of quantum has been agreed to be based on a certificate of indebtedness certifying amount due as at 6 April 2024 which in absence of manifest error would be deemed conclusive evidence of the amount I stated to be due (see exh NBN7 at pp 412–413 of encl 11). On the specific issue of the *murabahah* profit rate and *ta'widh,* it is argued that the same has been agreed and duly implemented according to the agreement. As to the issue of *ibra'* it is simply argued that the same is only to be granted on the condition of early or full settlement of the loan.

[52] On this issue of quantum, I find that the facility agreement contains conclusive evidence clause pertaining to the bank's statement and certification. This can be seen in cll 18.2 and 24 of the facility agreement which states as follows:

> 18.2 Statement of Account
>
> A statement of account in writing stating the amount payable by the Customer under the Facility and/or under the Transaction Documents and indication as to how such amount has been calculated and duly certified by any authorized officer of the Bank shall in the absence of manifest error be conclusive that such amount is in fact due and payable by the Customer including for the purpose of legal proceedings.
>
> 24 EVIDENCE OF INDEBTEDNESS
>
> In any proceedings relating to this Agreement a statement as to any amount due to the Bank under this Agreement giving reasonable details of the basis of calculation or determination of that amount and which is certified as being correct by an officer of the Bank, unless otherwise provided in this Agreement and in the absence of manifest error, be conclusive evidence that such amount is in fact due and payable.

[53] Whereas cl 2(n) of the guarantee stipulate as follows:

> 2. GUARANTOR'S COVENANTS
>
> The Guarantor hereby agrees, undertakes and covenants with the Bank as follows:
>
> ...
>
> (n) Conclusive Evidence
>
> that a written statement from the Bank as to the amount due and owing by the Customer shall be accepted by the Guarantor as conclusive evidence that the amount thereby appearing is due from the Customer to the Bank and payable on demand to the Bank by the Guarantor.

[54] Conclusive evidence clauses operate to establish that a determination of the amount owed by a debtor is, for all intents and purposes, final and binding as to the sum payable. Such provisions effectively preclude the need for protracted inquiries into the precise calculation of outstanding debts, sparing the parties the necessity of combing through financial records in search of potential discrepancies.

[55] In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) at p 284, the Federal Court held that the indebtedness of the borrower may be ascertained conclusively by such certificate:

> In the present case the guarantee contains a clause which enables the bank by producing a certificate of indebtedness by its officer to dispense with legal proof of the actual indebtedness of the respondents. Clause 19 provides thus 'A certificate by

> an officer of the bank as to the money and liabilities for the time being due or incurred to the bank from or by the customer shall be conclusive evidence in any legal proceedings against us or any one of us or our personal representatives'. *It means that, for the purpose of fixing liability of the respondents, the company's indebtedness may be ascertained conclusively by a certificate*: see *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643; *Bache & Co (London) Ltd v Banque Vernes et Commerciale de Paris* [1973] 2 Lloyd's Rep 437.
>
> *In the circumstances the respondents are bound under cl 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for*. (Emphasis added.)

[56] Lord Denning MR in *Bache & Co (London) Ltd v Banque Vernes et Commerciale De Paris* [1973] 2 Lloyd's Rep 437 (CA) had this to say at p 440:

> [t]hat, as a matter of principle, the conclusive evidence clause was binding according to its terms and, if notice of default was given in pursuance of the conclusive evidence clause it was binding according to its terms, the clause was not contrary to public policy.

[57] The Federal Court in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* through the judgment of Steve Shim CJSS quoted with approval of the case of *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643 (HC), where the High Court of Australia made the following observation:

> ... The bank could recover without the production of a certificate if, by ordinary legal evidence, it proved the actual indebtedness of the customer. But the (conclusive evidence) clause, if valid, enables the bank by producing a certificate to dispense with such proof. It means that for the purpose of fixing the liability of a surety, the customer's indebtedness may be ascertained conclusively by a certificate ... But the manifest object of the clause was to provide a ready means of establishing the existence and amount of the guaranteed debt and avoiding an inquiry upon legal evidence into the debits going to make up the indebtedness.

[58] Steve Shim CJSS in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* also held that 'a certificate of indebtedness operates in the field of adjective law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disapprove the amount claimed' (at para 11).

[59] The reference to 'manifest error' nevertheless would allow a comeback if there is a material mistake in the calculations. In the case of *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] EWCA Civ 264 (CA), the English Court of Appeal held as follows:

83. Is this a case of manifest error? There are two helpful recent authorities on this issue, namely *IIG Capital LLC v Van Der Merwe* [2008] EWCA Civ 542; [2008] 2 All ER (Comm) 1173 and *North Shore Ventures Ltd v Anstead Holdings Inc* [2011] EWCA Civ 230; [2012] Ch 31.

84. IIG was a claim for payment against guarantors. The defendants had bound themselves to pay on demand, absent manifest error. Lewison J, the trial judge, rejected the suggestion that there was manifest error. He said that a manifest error was '*one that is obvious or easily demonstrable without extensive investigation*'. The Court of Appeal approved the judge's approach to that issue and upheld his decision: see the judgment of Waller LJ at [33]–[35]. Lawrence Collins and RimerLJJ agreed.

85. North Shore was an action by a lender against the two guarantors of the loan. Clause 3.4 of the guarantee stated that a certificate signed by the claimant for the amount of the indebtedness was conclusive evidence against the guarantors, unless manifestly incorrect. The Court of Appeal approved the test for manifest error formulated by Lewison J in *IIG*. The court held that the certificate was invalidated by manifest error, because it did not take into account an agreed variation in the rate of interest.

86. At [61] Smith LJ said:

> On reflection I have come to the conclusion that for a party to rely on a manifest error in a certificate does not depend upon his ability to demonstrate the error immediately and conclusively. *In the present case, the guarantors were able to recognise immediately that the certificate was based upon the interest rates as set out in the original loan agreement and not as varied in November 2004. They could see that it was manifestly incorrect. They could not immediately demonstrate that conclusively; they could not do so until the court had determined the issue of variation. But they were right, as this court has now held. I would hold that the certificate was manifestly incorrect and was of no effect.*

87. Finally, in relation to the law, I should refer to *IG Index v Colley* [2013] EWHC 748 (QB). In a very thorough judgment Stadlen J reviewed the authorities on manifest error. At [813]–[814] he held that *the court could have regard to extrinsic evidence.*

[60] This principle is reaffirmed in the recent judgment of *Flowgroup Plc (in liquidation) v Co-Operative Energy Ltd* [2021] EWHC 344 (Comm) (HC), wherein the English High Court held that for a challenge based on a manifest error clause to succeed, there must be a plain and obvious mistake. However, whether such an error has indeed occurred is a matter of fact, and need not be glaringly apparent from the face of the certificates themselves. In *Flowgroup Plc (in liquidation) v Co-Operative Energy Ltd,* the error in issuing the certificates only came to light once the underlying contractual obligation was properly scrutinised.

[61] In applying these authorities, it is clear that in determining the existence of a manifest error, consideration must be given to the fact that certain errors may only come to light upon the court reaching a specific legal conclusion. Although it may not be feasible to demonstrate the errors as 'immediately and conclusively' incorrect at first glance, they may nevertheless still amount to manifest errors.

[62] In the present case, neither the principal borrower nor the guarantors raised any objections to the quantification of the debt. Nevertheless, guided by the authorities cited earlier, it is incumbent upon this court to scrutinize the certificate issued with due care, ensuring not only that they are free from manifest errors but also that the calculation of such charges free from the element of misconduct, negligence and/or breach of the terms and conditions outlined in the terms and conditions of the banking facility.

[63] As to the issue of *murabahah* profit rate, cl 8 of section 1 of the letter of offer dated 22 September 2020 provides as follows:

> 8. Profits : BFR + 1.25%pa
>
> (The Bank Ceiling Profit Rate is 9.58% per annum. Current BFR is 5.58%)

[64] As to the issue of *ta'widh,* cl 18 of the facility agreement provides as follows:

> 18. COMPENSATION FOR LATE PAYMENT
>
> 18.1 Compensation for Late Payment (Ta'widh)
>
> (a) In addition to and without prejudice to the Bank's rights powers and remedies in this Agreement and the Transaction Documents, the Customer shall be liable to pay the Bank compensation on any amount overdue as follows:
>
> (i) If the default occurs during the tenure of the Facility, at the rate of one percentum (1%) per annum on such overdue instalment under the Facility or on such outstanding balance of the Facility in the case of default causing the entire Facility to be recalled or brought to court for judgment prior to maturity, whichever applicable, or any other method approved by the Bank's Shariah Committee and/or Shariah Advisory Council of BNM; and
>
> (ii) if the default occurs after the maturity of the Facility as provided or upon judgment, whichever is earlier, at the rate to be calculated from the date of the default payment which is after the maturity date of the Facility and which rate shall not be more than the prevailing daily overnight Islamic Interbank Money Market (IIMM) rate on the outstanding balance of the Murabahah Sale Price.
>
> (b) It is further agreed that the compensation shall not be compounded,

(c) The compensation at the aforesaid rate shall be payable by the Customer after as well as before any judgment or order of court.

[65] As to the issue of *ibra'* cl 2.6 (i) of the facility agreement provides as follows:

...

For any avoidance of doubt, subject to the provisions of Shariah law, *the Bank shall grant an Ibra' (Rebate) to the Customer in the event the Customer makes early settlement or redemption of the Murabahah Sale Price* where the Customer has made the installment payments diligently. The Ibra' (rebate) is calculated based on the following formula:

Early Settlement Amount = Outstanding Murabahah Sale Price - Ibra' + Late Payment Charges (if any)

Ibra' = Deferred Profit + Undisbursed Principal (if any) - Other Charges (if any)

Ibra' means deferred profit which has not been accounted as profit earned. Any Ibra' granted by the Bank shall be deemed as final and conclusive and the Customer agrees as to the accuracy of the Ibra' granted without contestation or dispute. (Emphasis added.)

[66] In the present case, I am of the considered view that the *murabahah* profit rate and the provision as to *ta'widh* have been agreed to between parties and therefore should be enforced. On the issue of *ibra'* as the matter pertains to a default, the applicability of cl 2.6(i) above is beyond question. It follows that the plaintiff's duty to grant *ibra'* arises only upon the full settlement of the outstanding sum by D1 or its guarantors, D2 and D3. Consequently, the contention that *ibra'* should have been factored into the current calculation of the amount due is without merit, as the precondition for such a rebate has not been satisfied.

[67] Upon careful examination of the certificate of indebtedness, and having compared it against the sums demanded at the time of arrears and upon termination, I find no manifest errors, nor any indication of negligence, misconduct, or breach of contractual terms on the part of the plaintiff. Accordingly, I am satisfied that this issue does not give rise to any triable matter warranting further judicial inquiry.

DECISION

[68] Based on the aforementioned grounds, I have allowed the plaintiffs application for summary judgment against the defendants as prayed in encl 10 with costs of RM5,000.

A *Application allowed with costs.*

Reported by K Selvaraju

B

C

D

E

F

G

H

I